United States Court of Appeals

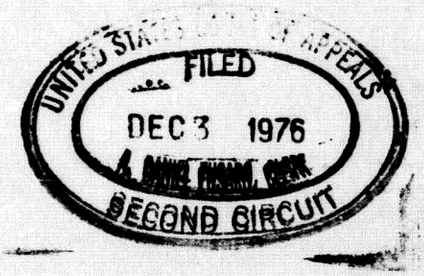
for the Second Circuit

NOTICE OF JOINDER

76-7352

UNITED STATES COURT OF APPEALS

For the Second Circuit



NADINE MONROE, ET ALS
Appellants,

VS

L. PATRICK GRAY, ET ALS,
Appellees

NOS. 76-7352-3

HENRY CONGDON, ET ALS,
Appellants

NOVEMBER 24, 1976

VS

L. PATRICK GRAY, III, ET ALS,
Appellees

B P/S

NOTICE OF JOINDER OF DEFENDANT IGOR I. SIKORSKY, JR. IN BRIEFS FILED HERETOFORE

The defendant appellee Igor I. Sikorsky, Jr. hereby joins in the brief filed by the defendants-appellees L. Patrick Gray et als and adopts as his brief said brief, and further relies on the opinion of the Honorable M. Joseph Blumenfeld and the memorandum of law filed before Judge Blumenfeld by the said defendant in the court below. For the convenience of this court said memorandum of law is reproduced and attached hereto and made a part hereof.

DEFENDANT-APPELLEE
IGOR I. SIKORSKY, JR.

BY John Ivan Haymond
John Ivan Haymond
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UNITED STATES DISTRICT COUPT

FOR THE

DISTRICT OF CONNECTICUT

NADINE MONROE and FLOYD RICHARD MONROE and LISA ALLEN MONPOE by THEIR MOTHER, NEXT FRIEND AND NATURAL GUARDIAN, NADINE MONROE, PLAINTIFFS,	CIVIL ACTION NO. 76/91
VS.	MARCH 26, 1976
GEORGE GILMAN and IGOR SIKORSKY, DEFENDANTS.	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff Nadine Monroe, for herself and her minor children, has filed a complaint in which she claims that defendants George Gilman and Igor Sikorsky conspired with other named attorneys, state judges, and her former husband to deny her civil rights during the course of her divorce action in the Connecticut state courts. Her complaint further claims that these defendants have conspired to restrain trade and enforce minimum fee schedules, allegedly in violation of the Sherman Anti Trust Act.

Plaintiff's complaint contains a long list of events by which plaintiff claims to have been wrongfully treated to her damage. The complaint concludes that these events constitute violations of the civil rights laws and the anti trust laws of the United States and that plaintiff is therefore entitled to bring suit against these defendants in this Court.

Examination of plaintiff's complaint reveals that plaintiff has alleged as fact what are conclusions of law which are clearly

erroneous, and has failed to make allegations sufficient to state a prima facie case of violations of any of the statutes upon which she relies.

The motion to dismiss filed by defendants Gilman and Sikorsky should be granted by this court, as plaintiff has failed to state a claim upon which relief may be granted by this Court, and has failed to allege facts sufficient to confer subject matter jurisdiction upon this Court.

THE §1983 CLAIM

Essential to a claim under 42 U.S.C. §1983 is the allegation and ultimate proof that the defendants acted under color of state law to deprive the plaintiff of rights secured by the Constitution and laws of the United States. Plaintiff has made conclusory allegations that defendants Gilman and Sikorsky acted under color of state law while taking those actions plaintiff claims to have been unlawful and injurious to her.

Defendants Gilman and Sikorsky are both practicing members of the Connecticut Bar, and in such capacity were representing plaintiff in her divorce action at the time of the allegedly wrongful acts. Plaintiff's allegations make this situation clear. She alleges that defendants, as officers of the Connecticut courts, were thereby acting under color of state law.

This conclusion of law has been rejected repeatedly in similar actions by various federal courts. Kovacs v. Goodman, 383 F.Supp. 507 (E.D. Pa. 1974), and the cases cited in the Memorandum in Support of Motion to Dismiss filed in this case by defendants Gray, Wool, Brand, and Suisman, Shapiro, Wool & Brennan, at pages 5 and 6.

As such state action is essential to a cause of action under

42 U.S.C. §1983, plaintiff's complaint should be dismissed insofar as it purports to state a claim against these defendants under that statute.

THE §1985(3) CLAIM

Essential to a claim under 42 U.S.C. §1985(3) is the allegation that the defendants' actions were motivated by some racial, or otherwise class-based, invidiously discriminatory animus against the plaintiff. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d. 338 (1971); Bricker v. Crane, 468 F.2d. 1228 (1st Cir. 1972); Arnold v. Tiffany, 487 F.2d. 216 (9th Cir. 1973); Westberry v. Gilman Paper Co., 507 F.2d. 206 (5th Cir. 1975); Harrison v. Brooks, 519 F.2d. 1358 (1st Cir. 1975); Dear v. Rathje, 391 F.Supp. 1 (N.D. Ill. 1975).

Although such a class need not be defined upon racial lines, Azar v. Conley, 456 F.2d. 1382 (6th Cir. 1972), it must be more than a novel class neither readily recognizable nor among those traditionally protected by the Civil Rights Acts. Bricker v. Crane, supra. Further, there must exist "an identifiable body with which the particular plaintiff associated himself by some affirmative act .... [A]t least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group." Westberry v. Gilman Paper Co., supra at 215.

Plaintiff has failed to allege membership in any class or racial group, or that defendants' alleged acts were motivated by her membership in any group, or that such acts were part of a pattern of discrimination against any class. Construing her allegations most liberally and accepting them as true for the sake of this motion, at best they may make out a spontaneous or individual treatment of plaintiff to which she objects. Even if the

alleged actions rise to the level of an actionable tort, such a cause of action is without the jurisdiction of the federal courts derived from the Civil Rights Acts. See Hughes v. Ranger Fuel Corporation, Division of Pittston Co., 467 F.2d. 6 (4th Cir. 1972).

Even if liberal construction of plaintiff's allegations could bring to light some class into which plaintiff could be fitted, plaintiff's complaint still lacks the allegations necessary to show that defendants conspired against plaintiff because of such class membership, and that the criteria defining such class were invidious. See Harrison v. Brooks, 519 F.2d. 1358 (1st Cir. 1975), where the Court found that evidence of a defendant's animus toward plaintiff personally was not probative of a class-based animus motivating an alleged conspiracy to deprive such class members of their civil rights. See also Arnold v. Tiffany, 487 F.2d. 216 (9th Cir. 1973), where plaintiff newsdealers alleged a "class" of over 400 newsdealers in a city, but alleged defendant's animus against only the seventeen plaintiffs who were attempting to form a trade association; the complaint was held insufficient to allege sufficient animus to satisfy the Griffin rule.

The necessary animus cannot be inferred from plaintiff's allegations of a violation of §1985(3) in statutory language, since such baldly conclusory statements alone will fail to state a cause of action under the statute. See, e.g., Place v. Shepard, 446 F.2d. 1239 (6th Cir. 1971).

Allegations of fact necessary to show a conspiracy among the defendants is also essential to a claim under 42 U.S.C. §1985(3), which, unlike §1983, expressly requires that two or more persons "conspire, or go in disguise on the highway or on the premises of another."

Plaintiff's complaint alleges no facts indicating any meeting or agreement for any unlawful purpose as to defendant Sikorsky. As to defendant Gilman, only three paragraphs of plaintiff's complaint come close to alleging any agreement for any purpose with any other named person.

Paragraph L. of the complaint alleges that defendant Gilman gave plaintiff certain advice while "intending" to permit defendant Wool to conceal property in which plaintiff asserts an interest.

Paragraph M. of the complaint alleges that defendant Gilman "prearranged" with defendant Wool that defendant Wool would not prosecute a pleading defendant Wool had filed. No time or place of this alleged "prearrangement" is stated in the complaint.

Paragraph Q. of the complaint alleges that on a certain date, defendant Gilman and defendant Wool, attorneys for the plaintiff and her former husband in their divorce action, met for two hours. Plaintiff alleges no purpose or result of such meeting.

Even if plaintiff could prove these allegations, including the intents which she imputes to defendant Gilman, they do not constitute a conspiracy, and fail to show any purpose to deprive plaintiff of her civil rights.

Therefore, plaintiff's complaint should be dismissed insofar as it alleges a violation of 42 U.S.C. §1985(3) by these defendants for failure to allege both the necessary animus and the required conspiracy.

THE ANTI TRUST CLAIM

To state a claim upon which relief may be granted under 15 U.S.C. §1 et seq, the Sherman Anti Trust Act, plaintiff must allege conspiracy, restraint of trade, interstate effect, and damage. The complaint must describe with definiteness and certainty the combination or conspiracy relied upon, as well as the acts done which resulted in damage to plaintiff. The complaint must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize. Adams v. American Bar Association, 400 F.Supp. 219 (D. N.J. 1975).

To allege conspiracy in violation of the Sherman Anti Trust Act, as a minimum the plaintiff must allege. 1) an agreement of a character justifying the finding of an unlawful combination, 2) acts connecting each defendant with the conspiracy, and 3) an overt act on the part of any defendant in furtherance of the conspiracy. General allegations of conspiracy without a statement of the underlying facts constituting such conspiracy are insufficient to state a cause of action under the Act. Vermillion Foam Products Co. v. General Electric Co., 386 F.Supp. 255 (E.D. Mich. 1974).

It is necessary that the plaintiff set out in reasonable detail the acts complained of, not just the circumstances from which plaintiff draws the conclusion that a violation of law has occurred and that plaintiff has been damaged. Walter Reade's Theatres, Inc. v. Loew's Inc., 20 F.R.D. 579 (S.D.N.Y. 1957). Plaintiff must also allege and show more than a course of conduct in which the defendants would have engaged regardless of others' conduct. Dahl, Inc. v. Roy Cooper Co., 448 F.2d. 17 (9th Cir. 1971).

The complaint in the instant case, while replete with what plaintiff styles as overt acts, is lacking allegations of facts which show a conspiracy. No agreement between defendants has been alleged which if proven could rise to the level of an unlawful combination; what concerted action is alleged, as in paragraphs M. and Q. of the complaint, is consistent with the lawful arrangements and activities incident to the everyday practice of law. While the circumstances which plaintiff describes may lead her to the personal conclusion that the legal profession and state judicial system have conspired against her, she is apparantly without knowledge of any facts which would show the necessary elements of such a conspiracy, as she has alleged none, though required by Walter Reade's Theatres, Inc. v. Loew's, Inc., 20 F.R.D. 579 (S.D.N.Y. 1957).

The conclusory statement that "the defendants did unlawfully, knowingly and wilfully combine, conspire, confederate and agree together and with each other," found in paragraph 3 of the complaint, is alone insufficient to state a claim. Arzee Supply Corp. of Conn. v. Ruberoid Co., 222 F.Supp. 237 (D. Conn. 1963). The plaintiff need not allege all the necessary evidence to prove her case, but must state a prima facie case of a statutory violation. Nagler v. Admiral Corporation, 248 F.2d. 319 (2nd Cir. 1957). Mere pleading of statutory words will be insufficient to state either a prima facie case or a claim upon which relief may be granted. Klebanow v. New York Produce Exchange, 344 F.2d. 294 (2nd Cir. 1965).

Although plaintiff need not meet any special or extra-detailed standard of pleadings for an anti trust action, Gretener, A.G. v. Dyson-Kissner Corporation, 298 F.Supp. 350 (S.D.N.Y. 1969), she must allege sufficient facts to make out the complex elements of act and intent which are necessary to constitute the violation

claimed. As was said in Vermillion Foam Products Co. v. General Electric Co., 386 F.Supp. 255, at 259 (E.D. Mich. 1974):

> "There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy.... Each of the defendants, therefore, has a right to know what he or it is alleged to have done which made him or it a part of the conspiracy and these acts should be alleged with sufficient definiteness."

The Vermillion court dismissed the plaintiff's complaint for alleging generally a conspiracy without any statement of facts to support that legal conclusion.

Plaintiff has failed to allege any facts which show any effect of the alleged conspiracy upon interstate commerce. In the absence of an allegation that the activities complained of are either in the flow of interstate commerce or substantially affect interstate commerce in more than an insignificant degree or an attenuated sense, the jurisdictional requirements of the Sherman Anti Trust Act are not met. Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d. 48 (3rd Cir. 1973); Page v. Work, 290 F.2d. 323 (9th Cir. 1961) cert den'd 368 U.S. 875 (1961). See Gulf Oil Corporation v. Copp Paving Co., Inc., 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d. 378 (1974) where this principle is compared to the jurisdictional requirements of the Clayton Act.

Plaintiff's only mention of interstate trade appears on page 2 of her complaint, where she states that the alleged acts and conspiracy of the defendants was "To knowingly and wilfully restrain the practice of law, and interstate trade...." "Such a general allegation of interference with interstate commerce is a conclusion of law and is controlled by the specific allegations of facts." Tobman v. Cottage Woodcraft Shop, 194 F.Supp. 83 at 88 (S.D. Cal. 1961); Seligson v. Plum Tree, Inc., 350 F.Supp. 440 (E.D. Pa. 1972).

It has been found to be improper to allow a plaintiff to inflate an individual state law tort claim into a federal anti trust case by general and vague allegations of violations of federal statutes. Spens v. Citizens Federal Savings & Loan Ass'n of Chicago Heights, 364 F.Supp. 1161 (N.D. Ill. 1973); Fischer & Porter Co. v. Haskett, 287 F.Supp.831 (E.D. Pa. 1968). As the Court in Sun Valley Disposal Co. v Silver State Disposal Co., 420 F.2d. 341 (9th Cir. 1969) noted, the federal courts are generally and properly reluctant to act upon what is essentially a state law claim before the state remedies are exhausted in a context permitting adequate state court review.

As the District Court for the Southern District of New York said in United Grocer's Co. v. Sau-See Foods, Inc., 150 F.Supp. 267 at 270 (S.D.N.Y. 1957):

> "It is regrettable that under our procedure a plaintiff can extemporize such an effusion as this complaint and by filing it in a public office compel the defendant to retain counsel and the court to spend the time of the public in attempting to supply by inference allegations which plaintiff, if it had facts to support them, could have actually set out in a small fraction of the time."

For these reasons, the defendants respectfully submit that the plaintiff's complaint should be dismissed insofar as it purports to allege a violation of the Sherman Anti Trust Act by these defendants.

Dated at Hartford, Connecticut, this day of March, 1974.

DEFENDANTS, GEORGE GILMAN and
IGOR SIKORSKY

By _____
John I. Raymond
Their Attorney
111 Pearl Street
Hartford, CT 06103

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Defendants' Memorandum in Support of Motion to Dismiss was mailed, postage prepaid, to Nadine Monroe at 16 Morgan Street, New London, Connecticut 06320, this day of March, 1976.

John I. Haymond

CERTIFICATION OF SERVICE

This is to certify that I have forwarded a copy of the foregoing by depositing the same in the U.S. Mails, postage prepaid, addressed to:

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